Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

(2)

No. 99-2053

In The

Supreme Court of the United States

DAVID HERN,

Petitioner,

v.

INTERMEDICS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

PETER W. DAVIS
JACQUES LEBOEUF
Counsel of Record
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
1999 Harrison Street, Suite 2200
Oakland, CA 94612-3572
Telephone: (510) 763-2000
Facsimile: (510) 273-8832

Attorneys for Respondent Intermedics, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in concluding that, under the facts of this case, the defendant's liability was so inextricably intertwined with the allocation of fault between the defendant and an absent party that, where reversible error infected the allocation issue, justice demanded that the defendant be given a new trial on all issues.

2. Whether the court of appeals erred in concluding that, under the facts of this case, plaintiff's counsel's misconduct was sufficiently prejudicial to warrant reversal.

CORPORATE DISCLOSURE STATEMENT

The following publicly traded companies hold or held during the relevant time more than 10% of the stock of Intermedics, Inc.:

Sulzer Medica Ltd. (NYSE: "SM")

Guidant Corporation (NYSE & PCX: "GDT")

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
SUMMARY OF ARGUMENT 1
STATEMENT OF THE CASE 2
WHY THE PETITION SHOULD BE DENIED 4
CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 5

Greenleaf v. Garlock, Inc., 174 F.3d 352 (3d Cir. 1999) 7

Kehr v. Smith Barney, Harris Upham & Co., 736 F.2d 1283 (9th Cir. 1984) 6, 7

La Plante v. American Honda Motor Co., 27 F.3d 731 (1st Cir. 1994) 5

Lies v. Farrell Lines, Inc., 641 F.2d 765 (9th Cir. 1981) 5

Morrison Knudsen Corp. v. Fireman's Fund Insurance Co., 175 F.3d 1221 (10th Cir. 1999) 5

STATUTE

Cal. Civ. Code § 1431.2 ("Proposition 51") 4

RULE

Sup. Ct. R. 10 5

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner Michael Hern obtained a judgment against respondent Intermedics, Inc. for compensatory and punitive damages for personal injuries in a trial tainted by judicial error and attorney misconduct. In an unpublished opinion written by the Honorable Ellsworth A. Van Graafeiland, a Senior Circuit Judge visiting from the Second Circuit, the court of appeals reversed and ordered a new trial on all issues.

Mr. Hern does not dispute that the trial was tainted by both error on the part of the trial judge and egregious misconduct on the part of Mr. Hern's counsel. Instead, he complains that (1) the misconduct was not so prejudicial as to merit reversal; and (2) the issue tainted by the district court's error was so isolated from the other issues tried that he should be able to take advantage of significant parts of the judgment that resulted from the error-ridden trial.

Mr. Hern's petition thus seeks review of an unpublished decision that creates no precedential conflict and that presents no issue requiring the interpretation of the constitution or of a federal or state statute. Nor does the petition otherwise raise any issue of nationwide significance. Rather, Mr. Hern asserts only that the court of appeals' opinion was erroneous. But the court of appeals' decision was firmly rooted in the facts of this case. It has no special significance and no impact on the development of the law. And in any event, the court of appeals' decision was correct under the facts of this case. The petition should therefore be denied.

STATEMENT OF THE CASE

Intermedics manufactures pacemakers, one of which was implanted in Mr. Hern to accelerate his natural heart rhythm. (Reporter's Transcript ("RT") 65, 105, 277-78, 1232-33, 1238) The pacemaker's battery apparently depleted prematurely, causing the pacemaker to fail after approximately three and a half years instead of the usual five to ten. (RT 177, 282-83, 300, 341, 378, 471-72, 932-33, 1386-87) When Mr. Hern went to the hospital complaining of an earache, the attending physician determined that his pacemaker had stopped working. (RT 67, 77, 1391, 1410; Excerpts of Record ("ER") 242) The following day, the pacemaker was removed and replaced without incident. (RT 67, 78, 204-205, 1393-94)

Before Mr. Hern's pacemaker failed, Intermedics had sent a safety alert to the physicians of all known users of that model with that particular battery. (RT 66, 1257; ER 152-56) That notice was received by four physicians and administrators at the Kaiser hospital in Los Angeles where Mr. Hern's pacemaker had been implanted. (RT 67, 162-63, 187, 297) But Mr. Hern had moved to the San Francisco Bay Area, where he was being cared for by a new Kaiser doctor. (RT 109, 451-52) Kaiser failed to notify Mr. Hern's new Kaiser doctor about the safety alert. (RT 288-89, 311-13, 464, 492)

Mr. Hern claimed that his life had been ruined by the premature pacemaker failure, and he and sought millions of dollars in damages from Intermedics. (RT 1772-77, 1784, 1791-95; ER 1-12) Intermedics contested all aspects of Mr. Hern's allegations; among other things, Intermedics wanted to ask the jury to attribute fault to Kaiser

for failing to ensure that Mr. Hern's doctor received the safety alert. (RT 48, 447, 1645-76; ER 17, 19) But the district court refused to allow Intermedics to ask the jury to place any part of the blame on Kaiser. (RT 1647-77)

In final argument, Mr. Hern's lawyer told the jury that other people had died on account of similar battery failures, but that Mr. Hern had been prevented from bringing that evidence before the jury. (RT 2075-76) Because the uncontradicted evidence established that the battery failures had in fact caused no significant injuries or deaths—and because the district court had not excluded any competent evidence to the contrary—Intermedics objected. (RT 2075) But the district court overruled the objection. (RT 2075) Later, the district court gave the jury a confusing admonition that only exacerbated the problem, whereupon Mr. Hern's lawyer repeated her improper suggestion that Intermedics had caused deaths, even though Mr. Hern had produced no such evidence. (RT 2077-78)

The jury awarded Mr. Hern $90,886.93 in compensatory damages and $1,550,000 in punitive damages. (RT 1951, 1953, 2024-25; ER 272, 274, 289, 325-28) Intermedics moved for a new trial or judgment on multiple grounds. (ER 329-57, 389-409) The district court took the motions under submission (without oral argument) for thirteen months and then denied all relief. (Appendix ("App.") 16-43) Intermedics appealed, arguing among other things that Mr. Hern's counsel had committed prejudicial misconduct and that the district court had committed reversible error in prohibiting Intermedics from asking the jury to assign any of the fault to Kaiser.

The court of appeals agreed with both claims, and it therefore reversed and ordered a new trial. (App. 15) The court set forth its reasoning in an unpublished opinion authored by the Honorable Ellsworth A. Van Graafeiland, Senior United States Circuit Judge for the Second Circuit, sitting by designation. (App. 1-15)

WHY THE PETITION SHOULD BE DENIED

1. The Petition Presents No Issue of Precedential Conflict. Although Mr. Hern claims that the court of appeals' opinion conflicts with other cases, the opinion is not published, and it cannot be cited as precedent. It therefore has no significance in the development of the law. Thus, even if the court of appeals erred—which it did not—its opinion would stand as an isolated case, undeserving of the time and attention of this Court.

2. The Petition Presents No Issue Involving the Interpretation of Any Constitutional Provision. Although Mr. Hern attempts to portray this as a Seventh Amendment case, the law in that area is well settled, no Seventh Amendment issue was briefed or decided by the court of appeals, and the petition does not in fact present any issue that implicates the Seventh Amendment.

3. The Petition Presents No Issue of Federal Statutory Construction. No federal statute is at issue in this case.

4. The Petition Presents No Issue of State Statutory Construction. Although the court of appeals' opinion does construe California's Proposition 51 (Cal. Civ.

Code § 1431.2) , its construction is in line with California authority, and the petition does not challenge that construction in any way.

5. The Petition Raises No Issue of Special Significance. Mr. Hern raises no issue of nationwide import that must be resolved by this Court. Mr. Hern complains only that (1) his lawyer's misconduct was not so prejudicial as to justify reversal; and (2) the court of appeals ordered broader relief than the circumstances of this particular case warranted. Both of those issues are firmly rooted in the facts and circumstances of this case, and neither merits resolution by this Court.

6. The Court Of Appeals Committed No Error. Because the petition so plainly fails to satisfy the requirements of Rule 10, a lengthy analysis of the merits of Mr. Hern's claims is unnecessary at this juncture. But Mr. Hern has misstated the law on both points.

To begin with, while there is certainly authority that the court of appeals was not *required* to order a complete new trial, none of the cases that Mr. Hern cites holds that it was *prohibited* from doing so. To the contrary, those cases recognize that the courts of appeals have broad discretion in deciding whether to limit the issues when remanding for a new trial, and that they should order a complete new trial when the issues are inextricably intertwined. *E.g.*, *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, 175 F.3d 1221, 1255 (10th Cir. 1999); *La Plante v. American Honda Motor Co.*, 27 F.3d 731, 738 (1st Cir. 1994); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 774 (9th Cir. 1981). In this case, the court of appeals concluded that Intermedics's liability was so inextricably

intertwined with the allocation of fault between it and Kaiser that justice demanded a retrial of all issues. Given that the same facts are relevant to both issues, the two issues are about as intertwined as could be. In fact, the same evidence is also relevant to the punitive damages issue—which the court of appeals found also needed to be retried. Thus, a retrial on all issues will not take any more time than a partial retrial. For these reasons, the court of appeals' grant of a new trial on all issues cannot be deemed an abuse of discretion.

Mr. Hern also misstates the court of appeals' analysis of the misconduct issue. To begin with, the opinion does far more than say that the jury verdict was "influenced" by the misconduct. (Petition ("Pet.") 6) The court of appeals' opinion devotes two and a half pages to explaining why the misconduct was sufficiently prejudicial to require reversal. (App. 10-12)

Mr. Hern further misstates the holdings of the cases he cites on this issue in two respects. First, contrary to Mr. Hern's claim, the Ninth Circuit has not held that misconduct during closing argument can *never* be sufficiently prejudicial to warrant reversal. The cases that Mr. Hern cites merely recite several factors that the court has used in determining whether the district court abused its discretion in refusing to grant a new trial. One of those factors is whether the statements were isolated or persistent, and another is whether the damages are excessive. *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283 (9th Cir. 1984). But each case must be viewed on its own facts, and neither *Kehr* nor any other case holds that the absence of any particular factor precludes a finding that the misconduct was so prejudicial as to require a new

trial. In any event, the court of appeals did not determine whether the punitive damages awarded in this case were excessive; the court did not need to reach the issue.

Second, Mr. Hern misstates *Greenleaf v. Garlock, Inc.*, 174 F.3d 352 (3d Cir. 1999), which he claims "reached a contrary conclusion" from *Kehr*. (Pet. 15) The court of appeals in *Greenleaf* held that the district court had not abused its discretion in denying a new trial on grounds of attorney misconduct, just like in *Kehr*. While the Ninth Circuit and Third Circuit tests are worded slightly differently, Mr. Hern points to no substantive difference between them, and none is apparent. The cases are completely consistent.

CONCLUSION

Mr. Hern, Intermedics, and the court of appeals all agree that the trial in this case was riddled with judicial error and lawyer misconduct. The only disagreement is the remedy. Mr. Hern suggests that a muddled instruction adequately cured his lawyer's misconduct; the court of appeals held that Mr. Hern's lawyer had done too much damage and that the trial court failed to fix the problem. Mr. Hern also suggests that he should be able to maintain some of the benefits of the error-ridden trial; the court of appeals opted for a complete re-trial, which in this case will take no longer than a partial re-trial.

This petition thus does not even come close to meeting the criteria this Court has expressed for granting *certiorari*. There is simply no reason for this Court to substitute its discretion for that expressed in the court of

appeals' unpublished opinion. The Court should therefore deny the petition.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

JACQUES LEBOEUF
Attorneys for Respondent
Intermedics, Inc.